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No. 89-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner
v.
UNITED STATES DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL, and
FEDERAL LABOR RELATIONS AUTHORITY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM

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As we observed in our petition (at 10-11), the decision of the lower court has stripped a substantial number of tenured federal employees of longstanding rights to challenge unjust dismissals through a negotiated grievance-arbitration procedure, as guaranteed by the plain language of Chapter 71 of the Civil Service Reform Act (CSRA), 5 U.S.C. 7101, *et seq.* The Department of Treasury's opposition demonstrates that a misreading of one of this Court's precedents (*United States v. Fausto*, 484 U.S. 439 (1988)) is the only foundation for the lower court's negation of these crucial job protections. Review by this Court is warranted to rectify the lower court's error.

1. As Treasury observes, the "heart" of the lower court's ruling was its belief that under the Civil Service Reform Act, as construed in this Court's decision in *United States v. Fausto*, Congress contemplated "outside review" of adverse personnel actions only for competitive service employees and preference eligibles. Treasury Opp. at 12. In fact, however, *Fausto*—which made no mention at all of Chapter 71 of the Civil Service Reform Act—does not stand for that broad proposition.

In *Fausto*, this Court held that excepted service employees may not circumvent the CSRA's scheme by obtaining direct judicial review of adverse personnel actions in the Claims Court under the Tucker Act. *Fausto* recognized that Congress intended to enact a comprehensive, self-contained scheme for the adjudication of adverse personnel actions in the CSRA. 484 U.S. at 443-445. This Court concluded that it would frustrate Congress' intent if excepted service employees were allowed to nonetheless pursue remedies outside the CSRA scheme—in particular, direct judicial review of adverse personnel actions. The Court so concluded because Congress had intentionally denied excepted service employees any judicial review of adverse personnel actions under chapters 43 and 75 of the CSRA; it had, in fact, denied direct judicial review of adverse personnel actions to all federal employees, including those in the "preferred" class, *i.e.*, competitive service employees and preference eligibles. *Id.* at 448-450.

Contrary to Treasury's arguments, *Fausto*'s rationale does not establish that when Congress limited the appeal rights of excepted service employees under Chapters 43 and 75 of the CSRA, it also negated the rights it simultaneously granted *all* union-represented employees under the plain language of Chapter 71. In fact, *Fausto* suggests precisely the opposite. Chapter 71 is, after all, also a key part of the CSRA's "comprehensive" scheme,

and it does not exclude the grievances of excepted service employees from its coverage.[1]

The government's argument, like the decision of the lower court, does not take any account whatsoever of Congress' intent, demonstrated in Chapter 71, to provide employees who are represented by unions with outside review—through the grievance-arbitration process—of a broad range of agency decisions for which the Statute provides no outside review to employees who are not so represented. *See* NTEU Pet. 14-16. In short, to the extent that under the Union's proposal some excepted service employees obtain rights to outside review not granted to them under Chapters 43 and 75, it is because they are represented by a union, and can therefore benefit from the rights Congress granted under Chapter 71.

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[1] It is no answer to the plain language of Chapter 71 to observe that the definitions of "employee" and "grievance" in Chapter 71 (5 U.S.C. 7103(a)(2); (a)(9)) are "general" or "broad." *See* Treasury Opp. at 13. On the contrary, those definitional provisions are as specific as, and entitled to the same respect as the definitional provisions this Court found significant in *Fausto*. *See* NTEU Pet. at 3-4; 12-13. Moreover, to the extent the provisions are "broad," that reflects Congress' intent to make the grievance procedure widely available to union-represented employees. *Id.* at 15.

In order to depart from this plain statutory language, at the very least, the lower court should have identified some affirmative indication in the CSRA that the Congressional will would be frustrated if excepted service employees could secure arbitral review of adverse personnel actions. In *United States Department of Justice v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983), for example, in holding that probationary employees could not grieve and arbitrate dismissals, the court did not rely merely upon the fact that probationary employees do not have appeal rights under Chapters 43 and 75. It emphasized that the whole purpose of a probationary period is to assure management the right to summarily terminate such employees. *Id.* at 727-30. By contrast, in this case, the government provides *no* policy justification Congress might have had for precluding all outside review of the dismissal of tenured excepted service employees; in fact, Congress expected such review to take place. *See* NTEU Pet. at 13-14.

Moreover, and contrary to the government's arguments, the Union's proposal does not eliminate "essential" distinctions between excepted service employees and those in the competitive service. Treasury Opp. 12. In fact, as the government concedes in its opposition (at 11-12), and, contrary to one of the key underpinnings of the lower court's decision (Pet. App. 7a-8a), even if the Union's proposal were adopted, competitive service employees would continue to enjoy a "preference" in the statutory scheme, including, among other things, a right to judicial review. *See* NTEU Pet. at 16-18.[2] Again, far from eliminating essential distinctions, the Union's proposal gives effect to another essential distinction the Statute creates: the distinction between employees who are covered by a collective bargaining agreement, and those who are not.[3]

2. The government's opposition fails to present any response to our argument that the Union's proposal would

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[2] In a footnote (Treasury Opp. 12, n.10), the government raises for the first time in this case the specter that excepted service employees might be able to obtain review of the arbitrator's decision before the Federal Circuit through some far-fetched interpretation of the language of 5 U.S.C. 7121(f). However, section 7121(f) could not reasonably be read to support that result. Only matters "covered under sections 4303 and 7512" may be appealed to the Federal Circuit. 5 U.S.C. 7121(f). An excepted service employee's challenge to an adverse personnel action is not covered under those sections. Indeed, as the government recognizes (Treasury Opp. at 12, n.10), neither the lower court, nor the parties, including the Federal Labor Relations Authority, the Union, or even the government itself have ever suggested the interpretation the government has now concocted.

[3] We observe that although the government's view of the statutory scheme does not give effect to Congress's intent to provide special rights for union-represented employees, it makes no attempt to bolster a key, but faulty, pillar of the lower court's ruling (Pet. App. 7a, 11a-12a)—that Congress instead intended to actually *preclude* union-represented employees from obtaining protections from adverse personnel actions that employees not so represented do not enjoy. *See* NTEU Pet. 14-16.

not interfere with the "primacy" that the Statute grants to the MSPB and the Federal Circuit. NTEU Pet. 18-19. As we showed in our petition, under our proposal those bodies remain the primary adjudicators of adverse personnel actions; the FLRA merely assumes the critical, albeit secondary, role it was also intended to play in this area. *Id.* Moreover, the government has failed to explain how recognition of the FLRA's secondary role would interfere with the policies underlying the grant of "primacy" as described in *Fausto*, since it would neither add "an unnecessary additional layer of judicial review" nor prevent the government from developing "a unitary and consistent Executive Branch position on matters involving personnel action." *See* NTEU Pet. at 20, quoting *Fausto*, 484 U.S. at 449.

3. Finally, the government contends (Treasury Opp. 14) that this Court should not grant review of the important issue presented by this case because Congress is currently considering legislation that would permit excepted service employees to appeal adverse personnel actions to the Merit Systems Protection Board. However, similar legislation has been before Congress in the past, has been opposed by the government, and has not been enacted.[4] This Court should not postpone review and permit continued disregard of the rights Chapter 71 grants, on the basis of the slim possibility that this latest incarnation of the bill will have a different fate.

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[4] As the government observes, H.R. 3086, 101st Cong., 1st Sess., has been passed by the House. Similar bills were also passed by the House during both the 99th Congress (H.R. 917) and the 100th Congress (H.R. 3875). The government opposed those bills and they were never considered by the Senate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1990